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How to use philosophy when being a (comparative) lawyer

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Abstract

The article focuses on the dominant understanding of law as being a pure, sealed discipline, mainly on account of law’s normative, professionalized and institutionalized character. It challenges this view against the background of comparative legal studies and, in particular, from the perspective of the culturalist periphery which deploys an alternative epistemology leading to a complex understanding. Culturalism includes interdisciplinarity as a principle of its agenda, arguing that philosophy is part of law. The article analyses the need for philosophy within such a context, records the ways in which philosophy is used, offers an overview of the recurrent philosophical themes and philosophers and concludes on the dangers of such an enterprise.

Keywords: Discipline; purism; interdisciplinarity; positivism; culturalism; philosophy.

1. Law as closed

If a ‘field of knowledge’ usually refers to an epistemological perspective that first creates its own object and then poses the convenient explanations, then, a ‘discipline’ would rather connote the strategies of power that assert the limits of the field and establishes the hierarchies inside it [1], disciplinarity concerning the connection between knowledge and power [2].

Law as a field (or for that matter, a discipline) is particularly closed, if not “sealed” [2], to the extent that one could meaningfully ask whether lawyers see philosophers at all or whether they rather live in hopeless epistemic blindness. In fact, will philosophy always be but a footnote reference or a marginal comment in some (not even in all) legal books? Is there a gap between law and any other ‘non-legal’ forms of knowledge, including the

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philosophy of law? Is the philosophical subtext relevant only for the peripherical, disobedient and subversive lawyer?

Legal hermetism is usually explained by law’s normative and institutional character. As it is meant to regulate society in general – but also a specific society, with unique, irreducible features – law belongs to tradition (also to a certain tradition, be it a national, a regional or to a certain extent a ‘globalized’ one); or tradition is considered to be static, stable and inexorable. Equally, law should remain relatively uncomplicated, since (interdisciplinary) complications generate uncertainty, while uncertainty is detrimental to predictability and ultimately to the rule of law [3]. Indeed, in accordance with the authority paradigm within which they operate, lawyers may well criticize the legal text both from the point of view of its contents or form, as well as with respect to the social effects that it is supposed to generate, but they cannot deny its character of being law [3]. Furthermore, if it is true that each discipline acquires its epistemological strength out of its members’ consensus, the law has developed a remarkably coherent professional corpus, theorized as l’entité doctrinale, which exercises its control on the legal meaning, but also on the legal profession, for the purpose of avoiding distortions and excluding contradictions [4].

But the opacity that the legal field has developed with respect to most of the other “non-legal” disciplines is also due to at least two more facts. The first might be referred to as the law’s self-sufficiency or self-claimed supremacy. Indeed, law’s pre-eminence in respect to any other field of knowledge represents the lawyers’ most intimate statement of faith. As it has been pointed out, within the continental European nomothetical tradition, law is (and represents the study of) the legal text (la loi), which itself is traditionally sacred [5;6]. Therefore, out of its “transcendentalism” [7] law has to remain pure.

Rather contradictorily, the second argument resides in the law’s strive “to preserve [its scientific] capital” [8]. The general context of the 20th century, the science century by excellence, forced lawyers to apply to the law, the object of their study, scientific values such as truth, certainty, rationality, neutrality, objectivity or hypotheses testability. Within law, the scientific general paradigm has thus generated a discourse tending to rationalize, structure and systematize reality, for the purpose of conferring it an appearance acceptable from the widely adopted scientific point of view, thus granting law meaning and value. In other words, in order to be perceived as a respectable cognitive approach, the legal science itself has had to promote the attributes of the pure positive sciences, recreating law according to an aesthetized pattern, focusing on systemicity, generality and predictable regularities.

Traditionally, what matters for lawyers is that the binding law within one jurisdiction should be described without distortion. Coherent with the general positivist scientific trend of the 20th century, such an approach will naturally and conveniently emphasize on the strictly conceptual, systematic, logical, neutrally articulated and objectively assessable dimensions of law. Within such perspectives, the hermetic character of the legal field can be said to represent an attempt to express the desire of scientific respectability of the field, which has gradually become an epistemological mark thereof.

Needless to mention, law’s purity and outmost coherence have been gained at a price that now is said to threaten the discipline “with philosophical and epistemological bankruptcy” [3], while law’s institutionalization and professionalization have turned the legal knowledge into a “disciplinary ghetto” [9].

2. Need for philosophy

The shortcomings of the orthodox perspective about law have become obvious within a particular discipline of the field: comparative legal studies. As such, the legal comparative reflection depends on the encounter of different national legal systems, which allows the emergence of cultural elements. Obviously, such a presence connotes a potential manifestation of the non-legal, unusual and uncomfortable for the classic lawyer. Unlike the classical legal discourse, the comparative law discourse is permissive to the non-legal dimension of law and opens to other fields of knowledge, also providing explanatory models that can highly differ from the strictly
legal ones. Indeed, once the foreign element intervenes in the legal discourse, the latter “cannot remain at home” [7], the overpassing of the local dimension meaning at the same time the transgressing of the strict, parochial, normativity. Relevantly, the emancipatory move out of the strictly legal model will be a never-ending odyssey, as “[w]hile the comparatist never ceases to cross the border, he never arrives on the other side” [7], particularly because the foreign is impossible to be “approached as a bounded, stable, fixed, form of knowledge” [7]. As it happens, focusing on law’s purism, the legal doxa, “stands as an epistemological obstacle to the understanding of foreign law” [7].

From the perspective of the legal comparison as sub-discipline of the legal field, a strong intellectual “disappointment” [8] has been therefore pointed out, generated by the lack of any explanatory dimension of the merely descriptive classic legal science whose “sclerotic political position” has been found “intellectually indefensible and ethically untenable” [8].

Philosophy has been deemed of outmost importance in order to prevent the risk of a possible contamination of the promising comparative legal studies with the epistemological disease of the general field, since, paradoxically, despite the requirements of their discipline, most legal comparatists only undergo “a geographical not an epistemological deterrioralization” [8].

Also – but for quite opposite reasons – philosophy can offer meaningful insights into the (rare) hypothesis of comparative law texts that offer themselves “a sophisticated assemblage of law, political theory and philosophy” [10]. In the same line, philosophy can constitute a supplement in understanding basic legal topics (such as “method”) that, despite their cardinal position in comparative law, remain “woefully under-theorized”, so that “key issues [about them] still fail to be addressed” [1]. The author’s claim in such a hypothesis is that “no meaningful answer to such questions can be offered without the benefit of interdisciplinary thought” [1].

All in all, philosophy is expected to offer “a different economy of knowledge, better suited to the poli-vocality and equivocality characteristic of cross-border legal scene” [8].

3. How to use philosophy?

Once the lawyer’s epistemological blindness has been overpassed, philosophy may come at their hand in different ways.

(1) Most generally, references to philosophers or philosophic theories are used to justify the comparatist’s attempt to disobey the established rules of the classical legal paradigm and especially to subvert the golden principle of purism in law. Thus, interdisciplinarity as a principle of the new approach to law is justified by the incorporation within the comparatists’ analysis of philosophical theories supposed to illustrate the poverty of the reflection in the classic legal paradigm. The philosophy of language has been therefore evoked in order to show the need for a linguistic insight when dealing with legal traditions in which law is expressed in different languages. Such an example could be the issue of multilingualism within the European Union or the one of legislative bilingualism in Canada [1]. In the same way, the various philosophical explanatory patterns of the relationship between world, language and truth- and also, in particular, the theories about fiction – have been discussed when dealing with the epistemological constraints of the comparative law analysis in general [11]. Even more frequently and more constantly, hermeneutics have been used to support the idea that the classical unequivocal relationship between the lawyer and law as an exterior object should be questioned within the field of legal comparison [1;7;12].

At its best, the pattern of the emancipatory interdisciplinary approach to (comparative) law from the perspective of philosophy would be the following: a topic is selected that presents relevance for the field, in the sense of “disciplinary hallmark” [12], such as the question whether comparative law should be reduced to a method. Like several other topics, this one has generated a centric (orthodox) opinion and largely marginal views. Predictably, the well-established perspective lacks any serious background of consideration and, therefore, fails to offer a coherent answer to fundamental questions belonging to the ontology of comparative law itself, such as,
for instance, “how, if at all, is method able to contribute to the credentialization of comparative law?” [12]. At this point, “a more detailed assessment” of the topic is introduced from a critical philosophical standpoint. In sum, the author draws “on the work of leading contemporary philosophers originating from specific cultural backgrounds and representing particular strands of philosophical thought in order to revisit [the subject]” [12]. Obviously, such critical and interdisciplinary engagement can only occur with topics that by themselves “bridge the various disciplinary configurations” [12]. The fact that the insights of the philosophers chosen are contradictory on a number of points is irrelevant, as far as there is one main point of agreement, namely that “their work on texts does not, and must not, partake of method” [12]. Once again, in this first hypothesis, the recourse to philosophy is animated by “an emancipatory impetus,” that of engaging in a “resignification” [12] of the concept at stake, urging comparatists to admit the relativity of their epistemological presuppositions.

(2) In almost the same line, but this time within a systematic approach, philosophy is used as a tool deepening the understanding of the key issues arising in legal comparison. For this purpose, comparatists would map the field, identifying the focal points thereof (which will also function as elements of division between the orthodox and the contracentric understanding of comparative law). Such relevant examples may be the concepts of ‘truth’ and ‘objectivity.’

Deploying a genuine interdisciplinary analysis, an eminent comparatist has traced the possible origin of the orthodox axioms on the truthfulness of comparative law in Edmund Husserl’s philosophy and more precisely in the philosopher’s attempts to reach a pure language that will fully convey unequivocal units of knowledge [7]. Concepts like the “splendor of the simple” or a “privileged centre as a locus of truth” [7] are inscribed within the husserlian truth plethora. At the opposite pole, James Joyce’s figure will be patronymical for comparatists that assume “equivocality”, “associative synthesis,” or the lack of positioning “accepting that truth is fissured by the linguistic process of signification” [7].

Apart from such polarization, a deeper incursion in the history of philosophy will show that truth can “fairly be approached as a cultural artefact” [7]. Indeed, philosophy shows that, as a response to the Sophists, Plato and Aristotle moved the criterion of discursive validity from the absence of self-contradiction to the principle of ‘adaequatio rei et intellectus’.

Similarly, the concept of objectivity is addressed from a philosophical perspective in order to question the basic assumption prevailing in the orthodox approach to comparative law which assumes “a monolithic and immutable concept” [7]. The interdisciplinary analysis reveals the philosophical background of one particular epoch – namely the late 18th century – to argue that objectivity as advanced by orthodox comparatists is neither a transcendal nor an unproblematic notion. Indeed, Konrad Zweigert and Hein Kötz, perhaps the most influential European legal comparatists, centre their protocol on objectivity without revealing to the reader “the complex semantic extension” thereof [7]. An interdisciplinary approach analyzing such use of the notion will in fact first contrast an “aperspectival objectivity” with a “mechanical objectivity” and an “ontological objectivity” in order to secondly identify their connections with moral philosophy and collaborative science. The works of David Hume, Adam Smith or Immanuel Kant, mainly devaluating prejudices, perspectival apprehension or the idiosyncrasy of one’s judgment, are connected with the needs of the early 19th century newly emerging scientific community within which communicability became an intrinsic value, triggering the imperative of neutrality. The conclusion drawn from the philosophical background is that contrary to what mainstream comparatists may think, objectivity expresses “values related to place and time,” being “an idea that was achieved on account of ‘an intense social discipline’,” therefore “it is revealed to be cultural” [7]. Such a conclusion allows the comparatist to dispute “the pertinence of truth as a way to ascribe relative standing to different law-worlds” [7]. Indeed, given the cultural character of ‘truth’ itself, any appeal to the concept as a means of establishing a hierarchy between legal cultures is deemed to be unsustainable on the account of “the suspicious metaphysical connotation that such a reference carries” [7].

As one may easily notice, the dismantling of a legal notion such as ‘truth’ or ‘objectivity’ with the tools of philosophy has in these particular instances not only offered a better understanding thereof, but it has also
relativised their orthodox uses and, paradoxically, recuperated them within the framework of the disobedient comparative law periphery.

(3) At an even more general and programmatic level, perhaps, philosophy as such may offer an explanatory framework for the cleavage between the classical (comparative) legal science and the contracentric lawyers at more than one level. Thus, Pierre Legrand has organized the comparative legal field in the orthodox center and the various peripheries and developed a theory showing that since the centre may have as an emblematic figure the philosophy of Descartes, the peripheral legal research is haunted by Derrida [13]. Within this framework, the centre is identified with one allegedly sacred book [14], which is analyzed according to a threefold pattern: what it says, what it means, the Cartesian allegiance of the meaning. Literally, the author claims that “to explain Kötz’s commitments […] it is illuminating to approach them within a Cartesian framework” [13] and, in order to make this point, an analysis of Descartes’ most important clusters of thought will be deployed (“the thought of the whole”, “the pure thought”, “the real distinction between the mind and the body of the man”, “experience envisaged only as the continuation of the system carried by method”, the ambition to found “a universal science”…). Subsequently, in a kind of “phenomenological move” [13] the author suspends the classical paradigm in search for a different kind of knowledge: one “that expands the comparatist’s consciousness of what law is, that does not see it as isolated, but as always-already engaged within the tradition and culture from which it emerges”, “knowledge about the law and the-other-in-law that is historical and epistemological, political and sociological, traditional and cultural”, “knowledge that situates posited law in interdiscursive and intertextual terms”, “knowledge that allows for slippage and ambivalence, for recurrence and ambiguity, for excess and uncertainty, for contingency and hesitation, for resistance and plasticity, for indiscipline and relativity”… For such a “counterscene” [13] to the classical legal paradigm, Derrida’s thinking is considered relevant, although the choice might be problematic: “there is a sense in which Derrida, because he intervenes as a philosopher, speaks from the ‘presumed outside’ of the law and, as such, is liable not to be taken seriously by lawyers” [13]. However, the Derridian philosophy should be examined within the comparative law research, at least because “there is a clear sense in which Derrida’s thought, no matter it issues from the ‘philosophical’ realm, partakes in law, not, of course, in the normative sense (it cannot identify the posited law), but in what one might call the ‘constitutive sense’” [13]. Consequently, the comparatist is determined to “introduce Derrida’s thought by focusing on aspects [deemed] particularly relevant for comparative legal studies” [13]. Thus, as we will see further on, the whole new paradigm of comparative legal studies is organized according to principles stated in accordance with the Derridian thought and in opposition with the Cartesian line of thinking.

(4) Within a genuine interdisciplinary approach, sometimes the text of the legal comparison directly refers to philosophical concepts in order to readily and accurately render an idea: “For the comparatist-at-law, then, the aim is to refuse to take statutes or judicial decisions as so many givens and, through an unceasing movement of oscillation towards and away from the posited, something like a Heideggerian Verwindung, to try to see how these law-texts are conditioned and shaped by contingent epistemological patterns directed to values – and also how the posited in action sustains and amplifies these values in its own guise” [7].

Similarly, sets of philosophical arguments may be applied to law for the purpose of theorizing either concepts or main principles relevant for the comparative law analysis.

Thus, Leibniz’s most famous statement that “[b]y virtue of imperceptible variations, two individual things cannot be perfectly similar,” or Gabriel Tarde’s conclusion that “to exist is to differ,” allow the theorizing of “the differential comparison,” concept defined as “a regulative idea that will not determine a particular solution in advance of the comparative negotiation taking place” [7] and of “differentialism” said to be “a governing principle of invention of meaningful meaning” [7].

Also, taking as a starting point Quine’s claim that all that can exist is “assignment of reference to a word by its speaker,” Pierre Legrand defends the point that, as far as comparatists-at-law are concerned, “anything that is said about foreign law is uttered by a comparatist, indeed by this or that comparatist,” idea kept both in philosophy and within the theory of comparison by the concept of “inscrutability of reference” [7].
(5) Sometimes again, philosophy can be used as a reading guide. The abstract of a text belonging to the legal doctrine of the new wave expressly argues that “an essay in comparative constitutional law by a leading U.S. comparatist must be read as formulating an objection to one of Jacques Derrida’s preeminent claims on the irreconcilability of selfness and otherness even as it omits to mention Derrida’s name” [10]. The same idea is rephrased later on as it follows: “Indeed, Derrida very much maintains a spectral presence from the beginning to the end of Michael Rosenfeld’s argument [...] In fact, his thereeness is so marked that what is arguably the main thesis of Rosenfeld’s book, its axial proposition, can be regarded as a direct response to Derrida’s thought, as the very outcome of Rosenfeld’s silent negotiation with Derrida” [10]. One can obviously ask the question of the legitimacy to be granted to such a reading, especially since, as the author himself admits, Derrida’s name is neither indicated in the text, nor in the text’s index or bibliography. However, since the legal text interpreted in Derrida’s key deals with the topic of reconciliation as a recurring theme or a leading motive, while the concern with the other is also a leading theme of Derrida’s work from first to last, the parallel might be reasonably drawn. Under such framework, then, it will be pointed out “the position on the dynamics between self and other that Rosenfeld wishes to circumvent, the pressure of which he wants to resist, as he engages in a covert discussion with Derrida” [10].

(6) There is also a discrete and implicit use of philosophy that may reasonably be interpreted as a sign that the most genuine form of interdisciplinarity has been put into practice within the comparative legal text. Thus, while speaking about “legal culture,” Pierre Legrand notices, without much emphasis within the general economy of the text, that the concept is “a tool to assist description, not an object that is being described” [7]. The remark focuses on the inherent performative character of all conceptual tools used by lawyers within the economy of their comparisons, indicating a deep understanding of the comparatist’s epistemological constraints.

(7) Lastly, in a fusional type of approach, philosophy – or at least some philosophical concepts or ideas – could turn into a textual practice to be constantly deployed by the lawyer who will irreversibly open its discourse to interdisciplinarity, as philosophy becomes the canvas exhibiting law, decrypting it and supplementing its meaning: “My point is that one can easily take the view that Derrida’s insights in interpretative matters and as regards the self/other dynamics are worthy of serious consideration, and may deserve to be received as theoretical investigations warranting translation into a textual praxis, without embracing the French philosopher’s world-view in all its ramifications” [8]. For an example of such an approach, the comparatist organizes his discourse around “eight [derridian] key clusters of ideas,” whose relevance to law will afterwards be proven through an example of legal interpretation deployed “other-wise” rather than within the classic paradigm [8]. Among these main concepts are considered to be those of Surface, Presence, Spectrality and Trace, Unconcealment, Obligation, Difference, Double Bind or Invagination as Justice. These theoretical commitments will help the comparatist ‘trace’ the meaning of a piece of legislation, in an attempt “to invent articulable traces constitutively haunting the law-text through infinitely complex networks of enmeshment – and therefore partaking of it as law-text” [8]. A French statute and a decision of the Supreme Court of Canada will indeed offer the opportunity to turn the philosophical concepts into units of the comparative practice [7]. Such praxis shows beyond doubt that the two pieces of law analyzed are constituted by arrays of traces haunting them and that each such trace is traceable to a further one so that no absolute origin of meaning can be justified [7]. The interpretation of the two foreign legal units once in co-presence is provisional and differed [7]. The same reasoning is applied to an institution of the type currently appreciated by positivists, that of the injunction stipulated by article 1184 (3) of the French civil code and its imperative that termination of contract should be requested in a court of law. Even such an anodyne institution that would be approached by the mainstream positivism descriptively for the unique purpose to assess how the French courts have interpreted its legal key words is in fact traceable and thus redeemed in the culturalist perspective. Indeed, article 1184 (3) of the French civil code is but a vector of various manifestations “of French culture and, in particular, of French legal culture – such as a strong assertive state, a well-honed social demand for state intervention, the deep distrust into which the individual is readily held, a
time-honored aversion for the unfettered play of the market and the related assumption that only the state can bring to bear the appropriate dose of solidarité that must feature within a French contractual relationship” [7].

4. Which themes? Which philosophers?

The newly-discovered interest for and relevance of philosophy triggers the presence in the (comparative) legal doctrinal discourse of unexpected themes such as truth – authenticity – plausibility; ethnocentricity/otherness; the general topic of the relationship between self and other; the current issues linked to texts – textuality – text interpretation; the concern for the epistemological constraints of the comparison; the unavoidable limits of the understanding; the general need for hermeneutics within the comparative law analysis; the relationship between world and words.

A non-exhaustive list of the main names of philosophers deemed relevant for the legal analysis within the new paradigm will include Jacques Derrida, Martin Heidegger, Hans-Georg Gadamer, Paul Ricoeur, Alain Badiou, Michel Foucault, Willard Quine, but also John Austin, Peter Strawson, John Searle, Charles Pierce. The basic points of interest in philosophy seem, therefore, to be ontology, but also hermeneutics and the analytic philosophy tradition or the philosophy of language. As the new legal paradigm constitutes itself as a reaction to the established authority in the centre of the field, it is not surprising that deconstruction, originally a form of semiotic analysis, as illustrated in Derrida’s works, becomes an epistemological principle.

5. Which dangers?

Unexpectedly domiciled within the legal field, interdisciplinarity will allow addressing questions generated by the interaction between heterogeneous disciplines.

Among those, the deepest concern of interdisciplinarity is probably the blurring of the genuine meaning assigned to a unit of knowledge within its original field. In this respect, an author has pointed out that “the imported product will always have the form of its appropriation rather than the form it exhibits at home; […] it will already be marked by the discourse it supposedly opens” [9]. This remark is particularly accurate with law, a field that has developed schemes of intelligibility meant to preserve its purity and to prevent it to connect. Interdisciplinarity could in such a context only de-center the legal knowledge, without however re-disciplinizing law. The apprehension that “in the beginning there was law. Then came law-and” [15] captures faithfully the problem: law may well be injected with interdisciplinary knowledge, the extraneous units remain but irritants to the field that annexes them without genuinely reevaluating its a priori.

This is not, however, the culturalist agenda, which seeks for meaningful polyphonic comparison. Ultimately, philosophy will re-signify comparative law in the deepest sense of the word. Indeed, philosophy is neither exterior to law, nor informally dissolved within it, but constitutive of it: “[by] way of a more sophisticated epistemological appreciation, the different discourses that have classically been said to lie outside of the law are recorded, or re-presented, as not existing outside of it after all, but as being of it” [7].

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